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Nos. 03-1164 & 03-1165

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COALITION OF COTTON APPAREL IMPORTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.*, and the Beef Promotion and Research Order, 7 C.F.R. pt. 1260, violate the First Amendment insofar as they require cattle producers and importers to fund generic advertising promoting the desirability of eating beef.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Coalition of Cotton Apparel Importers ("Coalition") is an unincorporated association of apparel retailers and importers. Its members are compelled—under the auspices of the Cotton Research and Promotion Act of 1966, 7 U.S.C. §§ 2101 *et seq.*, and implementing regulations, 7 C.F.R. pt. 1205 (Order) (collectively, the "Cotton Program")—to pay assessments that fund a program of cotton advertising to which the Coalition's members object.

This case is of substantial concern to the Coalition's members, because their First Amendment rights are trammeled by the Cotton Program in the same way that respondents' rights are affected by the Beef Research and Promotion Act and its implementing regulations (the "Beef Program"), 7 U.S.C. §§ 2901 *et seq.*; 7 C.F.R. pt. 1260. The Cotton Program, like the Beef Program, compels commodity producers and importers to fund speech with which they disagree—namely, advertising of the generic product. And, pursuant to that regime of compelled speech, each of the Coalition's members pays hundreds of thousands of dollars—or more—in annual assessments.

The Coalition has a strong interest in this case because of the particularly offensive nature of the Cotton Program. The Cotton Program commands assessments not only from producers and importers of cotton itself, but also from the commodity's downstream users—retailers that import cotton clothing (among their other products). Importers of cotton products have accounted for one third of the $60 million in annual fees paid into the Cotton Program. See USDA Re-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

search & Promotion Task Force, *Report to the Secretary of Agriculture* 7 (1999). Yet the members of the Coalition have no particular interest in the Program's promotion of cotton per se; it is only one of the many products that they sell. And, they certainly have no interest in the advertisements crafted by the Cotton Board that promote products that compete with products imported and sold by the Coalition's members. As a result, contrary to petitioners' reasoning, it cannot be assumed that the Coalition or respondents benefit from—and certainly they do not agree with—the speech they are compelled to finance. Accordingly, the First Amendment harms that they suffer cannot be justified as "government speech."

SUMMARY OF ARGUMENT

The leading edge of petitioners' argument is the claim that the speech being challenged here is "government speech," and is therefore immune from First Amendment scrutiny. *E.g.*, U.S. Br. 11, 15; Neb. Cattlemen Br. 3. Likewise, they treat this as a case about nothing more than sensible regulation and administrative law. *E.g.*, U.S. Br. 10-11, 17. For these reasons, petitioners treat this Court's First Amendment precedents concerning compelled speech cases as largely irrelevant. That argument, however, has it backwards. To be sure, certain types of government speech (those that involve no compulsion) are immune from First Amendment attack—as, for instance, when a government official speaks in his or her official role. But this Court has never held that a program like the one in this case—in which a targeted group of private entities is compelled to pay for speech with which they disagree, and which is spoken in their name—is government speech. And more fundamentally, never has this Court found speech to be unassailable government speech when the rights and values underlying this Court's "compelled speech" precedents are so clearly infringed. The simple reality here is that respondents are private entities that are coerced to subsidize speech with which they disagree.

As an initial matter, the Secretary's decision to require respondents to fund speech with which they unquestionably disagree places this case squarely within this Court's precedents concerning compelled speech. This Court repeatedly has recognized that the First Amendment is violated when the government compels speech. This same principle applies not only to compulsion to *speak words* that an individual wishes not to speak, but also to coercion to *subsidize speech* that one does not wish to fund. And, the findings below make plain that respondents here, like the numerous other challengers to agricultural checkoff programs, object to the speech that they are compelled to fund. The checkoff programs require entities to subsidize speech that assists their competitors, both directly and indirectly, notwithstanding strategic, economic and, in some cases, ethical objections. Simply put, the challengers to these programs are not "free riders"—they are dissenters.

It is no answer to claim that these First Amendment problems are obviated by labeling the speech as "government speech." "Compelled speech" and "government speech" are not two mutually exclusive categories, the latter of which trumps the former. On the contrary, the inquiry whether a particular speech program is properly characterized as constitutionally immune "government speech" depends on whether the program compels private entities to speak in a manner to which they object. When the government "controls" speech by compelling it, U.S. Br. 20, the speech is not immunized—it is unconstitutional. Accordingly, the government speech doctrine has *never* been used to insulate a program of compelled speech from First Amendment challenge. The doctrine is a shield used by the government to parry the objections of unwilling listeners; it is not, as petitioners would use it here, a sword to prod unwilling speakers.

Here, the federal government's programs pose special risks to First Amendment values. They are structured in a manner that serves narrow, private interests and interferes with

meaningful, democratic accountability. They were structured in this way precisely to remove them from the normal democratic process. And they compel speech from private entities in a manner that this Court has often recognized violates the First Amendment. Accordingly, this Court should finally declare that, with the narrow exception of checkoff programs that meet the unusual, comprehensive regulatory circumstances of *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), these programs represent an unconstitutional incursion on the free speech rights of the coerced participants.

ARGUMENT

I. REQUIRING RESPONDENTS TO PAY FOR AGRICULTURAL ADVERTISING WITH WHICH THEY DISAGREE CONSTITUTES COMPELLED SPEECH THAT VIOLATES THE FIRST AMENDMENT.

A. Compelled Speech Is Forbidden By The First Amendment.

1. It is axiomatic that the First Amendment is violated when the government compels speech, just as when it suppresses speech: "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *id.* at 234 ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633-34 (1943).

To understand this principle fully, the analysis properly begins with the compelled speech doctrine's two canonical cases: *Barnette* and *Wooley*. In *Barnette*, the Court struck down a West Virginia statute that required all students to sa-

lute the American flag and recite the Pledge of Allegiance. *Id.* at 625-29. Although the West Virginia legislature instituted this requirement for worthy reasons—"'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of government," *id.* at 625—the Court gave no deference to the legislature's choice, *id.* at 638; instead, the Court struck down the compelled speech with a ringing denunciation: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein," *id.* at 642. Pertinent here, the principle of *Barnette* is not limited to professions of ideology. On the contrary, *Barnette* (and cases like it) were the "beginning point for ... analysis" in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410 (2001).[2]

Barnette demonstrates the fallacy of the government's assertion that "[a] program involves government speech when the government controls the content of the speech that is disseminated under it." U.S. Br. 20. The government "control[led]" the speech at issue in *Barnette*, but the fact that the government coerced the speech hardly immunized it; on the contrary, it was precisely the fact of government control that rendered the speech unconstitutional.

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[2] Petitioners are therefore mistaken to argue that "*B[a]rnette* and *Wooley* are ... 'clearly inapplicable' to a program such as that established by the Beef Act," U.S. Br. 27-28. This argument depends entirely upon the government's characterization of *Wileman Brothers*, 521 U.S. at 470. But *United Foods* was decided after *Wileman Brothers*, and *United Foods* plainly holds that this Court's compelled speech jurisprudence is not just relevant, but is indeed the "beginning point for ... analysis." 533 U.S. at 410. To the extent *Wileman Brothers* disapproved reliance on the compelled speech cases, that reasoning is therefore necessarily limited to peculiar statutory schemes like the one at issue in that case, which involved "a more comprehensive program restricting marketing autonomy." *Id.* at 411.

The Court in *Wooley* again addressed the constitutional harms that arise when the state coerces speech. At issue were provisions of New Hampshire state law that required license plates to bear the state motto ("Live Free or Die") and made it a misdemeanor to cover "'the figures or letters'" on a license plate. 430 U.S. at 707-08. When the Maynards were prosecuted for covering the motto on their license plates, they challenged the state's action on First Amendment grounds, and this Court sustained that challenge. Recognizing that "the right to refrain from speaking at all" is a critical component of the First Amendment, *id.* at 714, the Court held that it is was unconstitutional to require the Maynards to "use their private property as a 'mobile billboard' for the State's ideological message," *id.* at 715.

Barnette and *Wooley* demonstrate the two important ways in which individual rights are affected when the government compels speech. These closely related infringements may be termed "coercive" or "first-person" harm; and "attributive" or "third-person" harm. First, compelled speech is tyrannical because, quite apart from an individual's interaction with the outside world, when the government coerces speech, such coercion interferes with personal liberty to craft beliefs and speak them freely; it is, therefore a first-person harm. See, *e.g.*, *id.* at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"); *Barnette*, 319 U.S. at 633-34 ("[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.... To sustain the ... salute we [would be] required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").[3]

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[3] *See also, e.g.*, 319 U.S. at 645 (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to

Compelled speech likewise impairs third-party relationships, because it creates the likelihood that thoughts and beliefs the speaker does not possess will be misattributed to him or her. It was for this reason that in *Wooley*, the Court recognized that forcing the Maynards to display the state motto against their will, "in effect requires that appellees use their private property as a 'mobile billboard'" that is "display[ed] ... to hundreds of people each day." 430 U.S. at 715. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, the Court likewise held that requiring parade organizers to include a group in the parade against their will would violate the First Amendment, in part because such forced association would risk "misattribution" of the group's message to the parade's organizers. 515 U.S. 557, 576-77 (1995); *accord Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994) (in challenge to cable must-carry provisions, noting significance of the fact that there is "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator"); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (no First Amendment violation in part because the views of pamphleteers in a shopping center "will not likely be identified with those of the owner"); see also *Abood*, 431 U.S. at 258 (Powell, J., concurring in the judgment) ("Disassociation ... lie[s] at 'the core of those activities protected by the First Amendment.'").

Both of these forms of harm, as detailed below, see *infra* at 10-15, are present in the checkoff cases.

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refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society ....").

For this reason, it is beside the point that "Congress has not restrained anyone from engaging in commercial speech." U.S. Br. 39. As this Court long has recognized, "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Abood*, 431 U.S. at 234.

2. These same foundational constitutional concerns apply when the government requires people to "subsidize speech with which they disagree." *United Foods*, 533 U.S. at 411; *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 231 (2000) ("It infringes on the speech and beliefs of the individual to be required ... to pay subsidies for the objectionable speech of others ...."). Forced subsidization of speech, no less than the forms of compulsion that were at issue in *Barnette* and *Wooley*, constitutes compelled speech. The seminal case in this regard is *Abood*, which concerned compulsory union dues paid by government employees that were used, in part, "to contribute to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative." 431 U.S. at 234. The Court held that the compulsory dues were unconstitutional to the extent they required objecting union members to fund such speech, for precisely the same reasons that the speech in *Barnette* and *Wooley* was unconstitutional:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. at 234-35 (footnote omitted); *accord id.* at 222 ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). Accordingly, the Court concluded that payments could be compelled to fund only speech that is "germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.[4]

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[4] To be sure, the fact that speech has been compelled—as it was in *Abood*, and as it has been here—is not the end of the constitutional in-

The Court reached precisely the same conclusion in *Keller* v. *State Bar*, 496 U.S. 1 (1990), which concerned compulsory payments to a state bar association. Applying *Abood*, the Court struck down the dues requirement insofar as the dues were used to fund activities that were not germane to "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. Again, the Court recognized the fundamental values that are at stake when the government compels speech, whether such coercion takes the form of speech itself or compulsory subsidization of speech. Quoting Thomas Jefferson, it reaffirmed that """to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."" *Id.* at 10.

This same principle was given force in *United Foods*, in which the Court struck down the Mushroom Promotion, Research, and Consumer Information Act, an agricultural checkoff program that is closely analogous to the Beef Program at issue here. The Court looked to *Wooley*, *Barnette*, *Abood* and *Keller*, and recognized that these "precedents concerning compelled contributions to speech provide the beginning point for ... analysis." 533 U.S. at 410. Importantly, the Court dismissed as a threshold matter the government's suggestion that the First Amendment was not implicated because commercial speech was at issue:

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quiry. Rather, once it has been determined that speech was compelled, a court still must consider whether this use of the government's coercive power is sufficiently justified. The germaneness inquiry is one method for testing this question, as are the competing *Central Hudson* and strict scrutiny tests. Those questions are addressed elsewhere. *See generally* Respondents' Br.; FLAG Br.; WLF Br. The purpose of discussing the compelled speech doctrine here is instead to demonstrate that the values of the compelled speech cases are implicated in this case, and that when such values are at issue, this Court has been unwilling to bless the compelled speech as "government speech."

> The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited.... First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

Id. at 410-11.

The Court then went on to reject the argument—advanced again by petitioners here in slightly less explicit form—that the mushroom growers' constitutional concerns were less significant because their objection to the message—that "mushrooms are worth consuming whether or not they are branded"—"could be seen as minor." *Id.* at 411.[5] On the contrary, the Court recognized that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom." *Id.*

B. The Speech Promulgated By Agricultural Checkoff Programs Is Compelled Speech.

1. The Secretary's requirement that cattle producers fund speech with which they disagree violates the First Amendment, in precisely the ways that the compelled speech cases

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[5] It is quite plain from petitioners' briefs that they view respondents' challenges to the Beef Program as trivial. They assert that "all beef producers benefit from generic advertising promoting beef," U.S. Br. 17—which respondents surely dispute—and speak dismissively of the financial burdens placed on respondents, *id.* at 41 (the Program "requires *only* that cattle producers contribute financially" (emphasis added)), and of their right to dissent, *id.* at 18 ("disagreement provides no basis under the First Amendment ... to excuse those who object from having to share the costs of the program"). The same claim was made in *United Foods*, and could have been made in *Abood* and *Keller*.

forbid. It is undisputed that respondents have a variety of serious and principled objections to the speech that they are forced to fund. Respondents raise domestic, grain-fed beef, which they believe to be superior to imported, grass-fed beef. JA 25, at ¶¶ 41-42. They object to the generic advertising of beef, because it sends the message that all beef is the same, and thereby conflicts with their belief that domestic grain-fed beef is superior. *Id.* at 34-36, at ¶¶ 96-98, 100-101; see also, *e.g.*, *id.* at 59, 62, 65, 68, 71, 74-75, 78-79. Furthermore, certain respondents produce particular brands or breeds of beef that they believe to be qualitatively superior to other beef—including, for instance, certified Angus or Hereford. *Id.* at 36, at ¶ 103.

Forcing respondents to pay money for speech with which they disagree constitutes both coercive and attributive harm under the First Amendment. As with any compelled speech, there can be no doubt about the coercive effect. Respondents are forced to support the message that all beef is good, when that simply is not what they believe. Furthermore, there is attributive harm. The advertisements are attributed, quite broadly, to "America's Beef Producers." *E.g.*, JA 50, 51. Respondents are among "America's Beef Producers"—and the message is therefore directly attributed to them—even though it is undisputed that they do not believe it. These advertisements are nothing more than the "'mobile billboard'" that the Court disapproved in *Wooley*. 430 U.S. at 715.

That respondents have very real objections to the speech they are forced to subsidize is a complete answer to petitioners' effort to frame this as a case with barely any First Amendment implications. Time and again, petitioners suggest that this case concerns nothing more than "collective action," "free riders," and the Secretary's claimed interest in promoting beef consumption. *E.g.*, U.S. Br. 10-11, 17. These assertions simply beg the question, for they presuppose that

such interests trump the First Amendment.[6] To be sure, the government sometimes has an interest in solving collective action problems. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (plurality). But whether there is a collective action problem to be solved says nothing about whether the means of solving that problem are constitutional; Mancur Olson may have had much to say about free riders, U.S. Br. 17 (citing Mancur Olson, *The Logic of Collective Action* (1971)); Cal. Agric. Issues Forum Br. 19 (same), but he had little to say about the First Amendment. The fact that Congress perceived there to be a problem, U.S. Br. 11, is hardly relevant to whether the solution it devised was a constitutional one. *Wileman Bros.*, 521 U.S. at 477 (Souter, J., dissenting) ("the legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation"). If the Secretary of Agriculture wished to use her budget to promote beef consumption, no one would blink an eye. But the government has decided to use means that implicate core First Amendment values, and petitioners cannot simply wish away those constitutional concerns.

Rather, as this Court's compelled speech precedents demonstrate, the proper threshold inquiry is whether respondents disagree with the speech they are compelled to support. *United Foods*, 533 U.S. at 411. In that regard, this case is not about collective action problems and free riders. A free rider is, as one of petitioners' *amici* recognizes, one "'who shares in the benefits.'" Cal. Agric. Issues Forum Br. 19. The very point of this challenge is that respondents, and other challeng-

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[6] One *amicus*, in fact, makes this argument explicitly, claiming that "[t]he fact that the *means* to Congress's end involves a speech component" is irrelevant to the First Amendment analysis. Br. of *Amicus* Cotton Shippers Ass'n 11. The notion that speech may be compelled so long as Congress has some non-speech purpose in mind is a radical view of the First Amendment, and one that is quite foreclosed by this Court's precedents, from *Barnette* forward.

ers like them, disagree with the speech. They do not believe that they benefit from it, and their intent is not to "free ride" on it; they wish to dissent from it, and at a minimum do not want to subsidize it. And their perspective in this regard is the relevant one. *United Foods*, 533 U.S. at 411 ("'[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented'").

For just this reason, it is important to understand the numerous ways in which the compelled subsidy of agricultural checkoff programs infringes upon First Amendment rights, and the various reasons that challenges to them have been brought. In some cases, like this one and *United Foods*, the objection is that generic advertising undercuts the seller's own, better product (whether domestic beef or a particular brand of mushrooms). This Court in *United Foods* recognized that this is a valid First Amendment objection. *Id.* And this objection demonstrates the fallacy of the Secretary's claim that advertising under checkoff programs "involves the promotion *of the very product* that the persons assessed have chosen to produce." U.S. Br. 38. A related objection is that generic advertising undercuts efforts to promote a premium product—as with the Angus and Hereford beef at issue here. JA 36; see also, *e.g.*, *Delano Farms Co.* v. *Cal. Table Grape Comm'n*, 318 F.3d 895, 897 (9th Cir. 2003) (challenge by sellers of "high end" grapes sold "to 'stores that will pay more money for higher quality product, as opposed to large grocery chain stores'").

Other programs impose fees to support advertising that is not merely inconsistent with, but in fact directly contrary to, the interests of the taxed party. The Cotton Program, for instance, does so in at least three separate ways. First, cotton apparel importers are charged fees on cotton apparel *imports* to support a program whose stated goal is "to maintain and expand domestic and foreign markets and uses *for United States cotton*." 7 U.S.C. § 2101 (emphasis added). Thus, al-

though *amicus*' members deal in imported cotton apparel, they still are forced to fund advertising for domestic cotton.

Second, many of these same importers do not deal exclusively in cotton; they import non-cotton goods as well. See Emergency Pet'n to Correct Constitutional Violation at 8, 9, *In re Citetec*, No. CRPA 04-00001 (U.S.D.A. 2004). Accordingly, they have no interest in subsidizing speech to further the message that "[c]otton is the basic natural fiber of the Nation." 7 U.S.C. § 2101. Yet they are forced to do so. Third, the speech funded by the Cotton Program includes advertising that features clothing by particular designers.[7] But many of the entities that are forced to contribute to this advertising are retailers that sell competing products. In no way is this speech on which they "free ride." It is speech that harms their interests; with which they disagree; and that they do not wish to subsidize.

Additional problems are well illustrated by the brief submitted by *amicus* Rose Acre Farms, which produces eggs. It objects to the egg program and the advertising it must subsidize, because it disapproves of the business practices of other egg producers and does not wish to finance speech that supports those practices. Whereas Rose Acre Farms ensures that its "chickens producing eggs are treated in a humane man-

[7] An example of such an advertisement—which features a "[s]tructured suit by Peter Som"—is reproduced at http://www.cottoninc.com/postCards2002/images/brilliant.jpg; *see also* http://www.cottoninc.com/postCards2002/images/elegant.jpg ("Corduroy evening gown by Kenth Andersson"); http://www.cottoninc.com/postCards2002/images/executive.jpg ("Tailored suit by Donna Degnan."). These advertisements regularly appear in print. *See, e.g.*, Women's Wear Daily, May 27, 2004, at 16 (promoting clothing by Lily Pulitzer).

These advertisements—like the advertisements at issue in the Beef Program—cause serious attributive harm. Just as the beef ads are attributed to "America's Beef Producers," the cotton ads—designed to promote United States cotton—are laid at the feet of "America's Cotton Producers and Importers," *id.*, not the U.S. government or the Secretary of Agriculture.

ner," "[t]he generic advertising engaged in by the American Egg Board promotes the consumption of eggs which do not meet these high quality standards." Rose Acre Farms Br., Mot. for Leave to File Brief *Amicus Curiae* and Statement of Interest, at 1-2. Thus, it simply is not the case that Rose Acre Farms generically supports the production of eggs, as petitioners assume that it must; rather, it supports such production only under narrow conditions that most producers do not satisfy, but which are ignored by the Egg Board's promotions.[8]

2. These multiple objections to checkoff programs demonstrate the impracticality of petitioners' suggestion that this Court draw a distinction between "ideological" and other forms of objections. *E.g.*, U.S. Br. 41 (arguing that the Beef Program "does not compel any producer to endorse or to finance any political or ideological point of view"); *id.* at 27, 38 (focusing on this same purported distinction); Neb. Cattlemen Br. 37. As a threshold matter, the Court rejected this very argument in *United Foods*:

> The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable [because there is no violation of] "'freedom of belief.'" We take further instruction, however, from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection.

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[8] Another serious and striking objection to checkoff-sponsored advertising arose in a case concerning the Florida Citrus program. There, a producer of grapefruits objected to the fact that

> the Department of Citrus has created and promoted recipes for alcoholic drinks containing grapefruit juice and has promoted the television program 'Sex and The City' in relation to consumption of alcoholic grapefruit juice drinks. The lifestyles, conduct and morality thereby promoted are not consistent with our views, and we object to being forced to subsidize it.

Br. of Appellees at 16, *State of Fla., Dep't of Citrus* v. *Graves Bros. Co.*, No. 2D03-2276 (Fla. Dist. Ct. App. 2003).

533 U.S. at 413 (citation omitted); *accord Abood*, 431 U.S. at 231 (rejecting the notion that "political" speech should be advantaged over "expression about philosophical, social, artistic, economic, literary, or ethical matters"); *Keller*, 496 U.S. at 13 ("[w]e are not possessed of any scales which would enable us to determine" whether labor unions or the California State Bar "serves more substantial public interests").

The line the government embraces is surely untenable. There is no principled way to distinguish between "ideological" or "political" objections, on the one hand, and other assertedly lesser forms of dissent ("economic" claims, presumably, on petitioners' view), on the other. Although the government repeatedly hints at such a distinction, it makes no affirmative case about how to draw it. It is unclear how the desire not to support one's competitors is "mere" economic objection, or why being compelled to do so is less significant under the First Amendment. Indeed, the Court in *Abood* explicitly equated an "object[ion] to [a] union's wage policy" with "ideological objections." 431 U.S. at 222. The appropriate rule is a simple one—when a program taxes a narrow group[9] for the purpose of funding speech attributable to that group (and assuming, of course, that the speech is not otherwise justifiable, see *supra* note 4), there must be some means by which dissenters can be relieved of their burdens under the program. *Abood*, 431 U.S. at 237-41.

II. THE FIRST AMENDMENT INJURY IN THIS CASE IS NOT OBVIATED BY LABELING THE PROGRAM "GOVERNMENT SPEECH."

In light of the serious First Amendment harms implicated by the program of compelled speech here, the "government speech" doctrine cannot inoculate the Beef Program from First Amendment challenge. This Court has repeatedly de-

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[9] When general tax revenues are at issue, the rule is of course different. *See infra* at 22-24.

clined to permit the government speech doctrine to shield programs that cause the types of harms set forth above. And never has the government speech doctrine been applied to fees exacted from narrowly defined groups to support speech purportedly issued on behalf of those groups.

A. The Government Speech Doctrine Is Informed By The Same First Amendment Values That Underlie The Compelled Speech Cases.

1. It is commonplace that "the government ... is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see also *Southworth*, 529 U.S. at 229 (recognizing the significance of whether "the government itself is the speaker"). Thus, when the government speaks, it may act in ways that would otherwise be forbidden—it may, for instance, engage in viewpoint- or content-based discrimination. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 544 (2001); *Rosenberger*, 515 U.S. at 833.

In certain circumstances, it is easy to identify government speech. There can be no doubt that government speech is at issue when a government official states the policy of the government—when the Secretary of Agriculture, for instance, announces that the government supports the use of new technologies in farming. See Ann M. Veneman, Sec'y of Agric., Address at the Farm Science Review (Sept. 21, 2004), *available at* http://www.usda.gov/documents/NewsReleases/2004/09/0412.doc. It is likewise government speech when the government, through general revenues, funds speech, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983), or refuses to do so, *Rust* v. *Sullivan*, 500 U.S. 173, 194-95 (1991). But beyond these two categories (and even sometimes within the latter one, see *Velazquez*, 531 U.S. at 543 (striking down funding restrictions that "regulat[e] private expression"), the analysis is significantly more complicated. It is not enough to assert that speech is "government speech," and thus that the First Amendment can be dispensed with. Rather, the determination whether speech should be attributed

to the government has always depended upon the same First Amendment concerns that underlie the compelled speech cases—coercive and attributive harm. No case holds that the government can compel unwilling speakers to speak merely by labeling the speech "government speech"; rather, the determination whether speech is the government's must be informed by the compelled speech cases.

This is clear from *Rust* (which, although it did not explicitly treat the issue as government speech, it has been interpreted as such, see *Velazquez*, 531 U.S. at 543-44). *Rust* concerned government funding of a program intended to put forward the government's message. In particular, it presented a First Amendment challenge to a statute and implementing regulations that "provided federal funding for family-planning services," but restricted the use of such funds "'in programs where abortion is a method of family planning.'" 500 U.S. at 178. The Court upheld the restrictions, concluding that the government may engage in "selective[] fund[ing]" without violating the First Amendment. *Id.* at 193.

In so doing, the Court noted that the program limited the speech activity of health care providers only when they were acting within the scope of the government program—i.e., when they were acting as agents of the government. *Id.* at 196 ("The ... regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."); *id.* at 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project ...."). And of critical importance here, the Court took care to note that the program in no way compelled any speech: "Nothing in [the program] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200; see also *id.* ("The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program."). In short, the

Court's determination that the speech could be categorized as government speech was informed, as it should be in this case, by the Court's conclusion that the program neither prohibited nor compelled private speech.

It is for these same reasons that *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), offers petitioners no support, and instead illustrates why respondents must prevail. *Santa Fe* addressed whether certain "invocations" before high school football games violated the Establishment Clause. In considering whether the state had endorsed religion, the Court noted that the challenged speech was "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" and, moreover, was limited by "particular [government] regulations." *Id.* at 302-03. Petitioners and their *amici* argue that similar facts are present here, and that the Beef Program is therefore constitutional. *E.g.*, U.S. Br. 20-21, 32; Neb. Cattlemen Br. 28.

To be sure, the types of facts identified in *Santa Fe* are generally relevant in determining whether it is the government that has acted. But the conclusion that these factors were enough to establish state action under the Establishment Clause in *Santa Fe* assuredly does *not* mean that there is government speech here under the Speech Clause. As the Court itself recognized in *Santa Fe*, "not every message delivered under [the above-listed] circumstances is the government's." 530 U.S. at 302. More fundamentally, the government role that was necessary to find a First Amendment violation in *Santa Fe* is not sufficient to establish government speech here—quite simply, the substantive standard for identifying government action that is subject to the Establishment Clause is fundamentally different than the test for designating government speech that is exempt from the Speech Clause.

Both the Establishment Clause and the Speech Clause limit the coercive power of the government. In the Establishment Clause context, the relevant inquiry is whether the state has

forced religion upon the citizenry by "endors[ing]" it. *E.g.*, *id.* at 302-05. When the state engages in endorsement—when it "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community'"—the speech "is not properly characterized as 'private' speech." *Id.* at 309. But the inquiry under the Speech Clause is vastly different. Whereas a relatively low bar to finding government speech in the Establishment context protects the rights of minorities against the coercive power of the state, a correspondingly low bar in the Speech context would permit easy invocation of the "government speech" doctrine, inoculate the government against First Amendment challenge, and make it easier to infringe the speech rights of the minority. Simply put, if it were government speech every time the government "endorsed" a message, the free speech protections of the First Amendment would mean precious little. Indeed, if that were the test, *Barnette* would have been decided differently, for West Virginia certainly endorsed the message that it compelled schoolchildren to recite.

Petitioners' proposed tests for identifying government speech, derived from *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), are woefully inapt because they provide wholly insufficient protection for the values that the Speech Clause is meant to serve. U.S. Br. 20-24; Neb. Cattlemen Br. 24-26.[10] That Congress has specified the message

[10] *Lebron* is in any event inapposite, for reasons similar to those that distinguish *Santa Fe*. *Lebron* explicitly recognized that even when an entity is "an agency of the Government[] for purposes of the constitutional *obligations* of Government," it need not be treated as such with regard to "the '*privileges* of the government.'" 513 U.S. at 399 (emphasis added); *see also id.* at 394 (recognizing that an entity may be an "agency or instrumentality of the United States" only for certain "purpose[s]"). That distinction governs here. In *Lebron*, the government's "obligations" under the First Amendment were at issue—how the First Amendment burdened the ability of a governmental corporation to engage in viewpoint discrimination. But here, a "privilege" is at issue—whether a private entity (the

does not solve this problem—it simply highlights that the government has compelled private citizens to speak its message. (And in none of the cases cited by petitioners did Congress specify the message and then fund it through narrow taxes on discrete groups.) The fact that Congress created entities to administer the speech simply means that the government has outsourced the implementation of its coercion. And the fact that the Secretary of Agriculture purports to oversee the agricultural checkoff programs only confirms that, at the end of the day, it is the coercive power of the state that is at work. Speech cannot be insulated from challenge as "government speech" when unwilling participants are compelled to speak. The simple reality in this case is that private entities are indeed coerced to subsidize speech with which they disagree.

2. The need to guard against coercive and attributive harm likewise demonstrates why, as the Court recognized in *Keller*, there is a critical distinction between programs funded by general revenues and those funded by narrow taxes levied on unwilling participants in a mandatory program. 496 U.S. at 10-11. In *Keller*, the Court considered whether the State Bar of California engaged in "government speech" for purposes of the First Amendment. The California Supreme Court had concluded that the Bar was a government agency for purposes of the government speech doctrine. 496 U.S. at 11. Indeed, the Bar was established by state law, *Keller* v. *State Bar*, 767 P.2d 1020, 1023 (Cal. 1989); had statutorily delineated functions, *id.* at 1024; was governed by a board appointed in part by the governor, *id.*; and was a public corporation, *id.* at 1025. Nonetheless, this Court rejected the California Supreme Court's determination that the Bar was a government agency. Concluding that the "'government speech' doctrine" did not

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Beef Council) and a quasi-public entity (the Beef Board) may avail themselves of the "government speech" defense. For all of the reasons set forth above, it may not.

apply, 496 U.S. at 10, the Court focused on facts that are equally germane in this case: the organization's membership was limited to a particular profession, and "[i]ts principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members," *id.* at 11.

Keller is significant here in several important respects. It vividly illustrates that claims of government speech require careful scrutiny, not reliance on label-making. And it shows that the inquiry into government speech is all the more significant when narrowly targeted taxes are at issue. The Third Circuit properly recognized this point in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), another case involving a challenge to the Beef Program. That court rejected the same argument presented here, U.S. Br. 28-30; Neb. Cattlemen Br. 33-38—that challenges to compelled taxes on a narrow group are no different than challenges to general taxes:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

885 F.2d at 1132 (citation omitted). It is precisely because contributors to checkoff programs belong to narrowly defined and "publicly identified" groups, and are required in that capacity to fund a program that purports to speak on their behalf, that the First Amendment is violated. They are coerced to subsidize speech, by means of funds that are directly at-

tributable to them, and the speech issued on their behalf is a message with which they disagree.[11]

This is why checkoff programs, and the objections to them, are easily distinguished from protests against speech funded by general tax revenues. Where general revenues are involved, it is well established that no First Amendment challenge is available. *Keller*, 496 U.S. at 12-13; *United States* v. *Lee*, 455 U.S. 252, 260 (1982). This is sensible as a practical matter, for to permit such lawsuits would ensure governmental paralysis. 455 U.S. at 260. Furthermore, there is little harm caused by such speech, as the coercive effect is de minimis, and there is little risk that the speech will be (mis)attributed to the unwilling taxpayer. In the terms used by *Frame*, the "nexus" is "attenuated" to the point of being nonexistent. 885 F.2d at 1132. No one assumes that the United States speaks for all of its citizens, but most people do probably believe that "America's Beef Producers" speak for all producers of beef. As a matter of democratic theory, too, to permit such challenges would make little sense; "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, account-

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[11] The argument that such concerns arise only when "*private* speech," but not "*government* speech" is at issue, Neb. Cattlemen Br. 34-35, simply begs the question. Whether speech can reasonably be categorized as "government speech" depends upon whether private entities are being forced to speak.

It is therefore of no significance here that it may sometimes be government speech "when the government 'disburses public funds to private entities to convey a governmental message,'" U.S. Br. 15 (quoting *Rosenberger*, 515 U.S. at 833), or when the government "enlist[s] private actors in disseminating the government's message," *id.* at 24. It is not *necessarily* government speech under those circumstances, *Velazquez*, 531 U.S. at 542 ("Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however."), and it should not be treated as such when coercion is present, which is precisely the point *Rust* took pains to emphasize. *See supra* at 19.

able to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235; see *infra* Section II.B.

But the reasons why challenges to speech funded by general tax revenues are unavailing, dissipate when challenges to speech derived from narrowly targeted taxes are at issue. The practical concern evaporates, because the universe of such suits is limited, by definition, to challenges based upon targeted taxes. There is greater First Amendment harm where such taxes are concerned, precisely because the compelled contribution "to a fund earmarked for the dissemination of a particular message associated with that group" necessarily means that "the government has directly focused its coercive power for expressive purposes." 885 F.2d at 1132.

Southworth is not to the contrary. Petitioners place heavy reliance on that case's statement that "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." 529 U.S. at 229; *see* U.S. Br. 18, 25, 28; Neb. Cattlemen Br. 19, 38. That statement does not control here. First, it was self-avowed dictum, *see* 529 U.S. at 229 (noting that the case "does not raise [this] issue"), and therefore is not controlling, *see In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases"); *Alden* v. *Maine*, 527 U.S. 706, 735-36 (1999). Second, the Court recognized that this principle holds true only "as a general rule." *Southworth*, 529 U.S. at 229. Third, of particular relevance here, the Court noted that, even were it government speech, an inquiry would *still* be necessary to determine whether there existed sufficient "political controls" to overcome "First Amendment objections." *Id.* Fourth, and perhaps most important, that case arose in the unique context of a public university. *Id.* at 230-32. That compelled student fees may be used to fund speech does *not* "reflect[] the common-sense notion that the costs ... should be borne by those who benefit from them." U.S. Br. 29. Rather, it reflects the common-

sense notion that public universities could not function if every student were permitted to withhold the portion of his tuition that funds classes, speakers or activities with which he disagrees. The message that "beef is good," funded by a tax on beef producers, hardly presents similar concerns.[12]

At the end of the day, it is utter hyperbole to claim that this case could "eviscerate the government speech doctrine," U.S. Br. 25, or that the challengers to agricultural checkoff programs seek "to silence the government," *id.* at 18; *accord* Mich. Pork Producers Br. 2 ("This case is about ... a claimed right to prevent the federal government from telling the public about the merits of eating beef."). The government remains free, regardless of the outcome of this case, to engage in such speech by funding it by means of general revenues or through a voluntary program. What it cannot do is define a class of people, levy taxes on that narrowly drawn class, and then issue speech on behalf of that class with which members of that class fundamentally disagree.

B. Claims Of Government Speech Deserve Particular Scrutiny When Quasi-Government Entities Are At Issue.

Keller further teaches that the need to examine claims of government speech is heightened when the program incorporates private or quasi-private entities, as is the case here (and in most other checkoff programs), for reasons that relate to the functioning of the democratic process. *Keller* recognized, on the one hand, that "the typical government official or

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[12] This case does not call into question user fees, which are obviously distinguishable. As the Secretary admits, the purpose of user fees is "to offset administrative and law enforcement expenses." U.S. Br. 30; they are merely "[a] charge ... for the use of a particular item or facility." *Black's Law Dictionary* 1579 (8th ed. 2004). User fees do not fund speech, and the Secretary in fact concedes that the user-fee cases upon which it relies "do not involve assessments to support government speech programs." U.S. Br. 31.

agency" represents the broader democratic polity, and must be free to speak in that representative role. 496 U.S. at 12-13. And if the polity disagrees with this message, it can react through political channels. *Southworth*, 529 U.S. at 235.

But when a "specialized" program has been created, with a membership defined by its profession and forced to participate, there is no such democratic accountability. *Id.* As Justice Powell observed in *Abood*:

> [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

431 U.S. at 259 n.13 (Powell, J., concurring in the judgment); see also *Keller*, 496 U.S. at 12 (the "specialized characteristics of the State Bar of California ... served to distinguish it from the role of the typical government official or agency").

A specialized program is not accountable to the normal democratic process because it relies on targeted taxes that fall on a targeted group and therefore need not face the scrutiny of the polity as a whole. Here, in fact, the government admits that the cost of the Beef Program was levied on beef producers precisely because, by taxing that group "rather than the public at large, Congress avoided the risk of undermining the very support for the beef industry that it sought to engender from the public." U.S. Br. 41. The Cotton Board's web site likewise touts the fact that "NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED." Cotton Board, *Facts About Checkoffs*, *at* http://www.cottonboard.org/index.asp?Cat=2&sub=&cid=364 (last visited Oct. 13, 2004). In short, the very purpose of structuring these programs in this fashion is to remove them from the democratic process, on the theory that society as a whole would not be willing to pay for them.

Nor does the internal functioning of these programs provide a reliable route to democratic accountability. Rather than direct control by politically accountable officials, these programs are operated in the first, and perhaps only meaningful, instance by industry members. The statutes *require* that the operation of the program be contracted out to an entity comprised of industry members. 7 U.S.C. § 2904(6) (beef); *id.* § 2106(g) (cotton). And that private entity does not even report directly to a politically accountable official; it operates through yet another private entity—here, the Beef Board. *Id.* § 2904; 7 C.F.R. §§ 1260.141-.169; *accord* 7 U.S.C. § 2106 and 7 C.F.R. §§ 1205.322-.332 (Cotton Board). To the extent that there is any democratic control, it comes only as a final, remote layer of review, and even then, it has been found to be merely "ministerial." Pet. App. 55a. And any such control is compromised by the fact that in certain programs, the program officials are paid out of checkoff funds, 7 C.F.R. § 1205.334(b)(2), (d)—they are, in short, beholden to the program that they operate.

Significantly, the boards and councils that administer certain programs need not be—and in fact are sometimes *statutorily precluded* from being—representative of the entities upon which they levy taxes. In the Cotton Program, the speech-supportive taxes are levied upon both cotton producers and cotton importers. 7 U.S.C. § 2106(e)(1)(A), (C). But only producers—not importers—may be represented in Cotton Incorporated, the entity that operates the program. *Id.* § 2106(b). Importers have sought representation, but with no success.[13]

Given the nonrepresentative and unaccountable nature of these programs, it is no surprise that they pose a serious risk

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[13] It is perhaps this lack of representation that explains the unfair double taxation to which importers continue to be subjected. See U.S. GAO, GAO/RCED-96-49, *Agricultural Marketing—U.S. Cotton Market Before and After Import Assessments* 2, 9-10 (Jan. 1996).

that money will be used as a weapon against dissent. The district court in this case found, for instance, that the Board was using millions of dollars of checkoff funds in an effort to discourage a referendum that would end the Board or the Program. *Livestock Mktg. Ass'n* v. *USDA*, 132 F. Supp. 2d 817, 820-22, 825-26 (D.S.D. 2001) ("*LMA*"). Using the compelled checkoff contributions of producers who dislike the program, in order to campaign against the views of those same producers, is offensive. Furthermore, such programs have been plagued by waste and self-dealing, as Inspector General reports have chronicled.[14] More to the point, as noted above, *supra* at 13-14 & n.7, it is commonplace under the checkoff programs for "one entrepreneur [to be forced to] finance advertising for the benefit of his competitors." *United Foods*, 533 U.S. at 418 (Stevens, J., concurring). And it is indeed the case that "the generic advertising promotes some brands but not others." *Id.* at 428 (Breyer, J., dissenting).[15]

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[14] For instance, the Cotton Board and Cotton Inc. have been admonished for spending $360,000 on a Christmas party at the Metropolitan Museum of American Art in New York, which "was held to promote the stylishness of cotton." *See* USDA, Office of Inspector Gen., Audit Rep. No. 01099-2-At, *Agricultural Marketing Service, Cotton Research & Promotion Program, Cotton Board* 14-15 (May 1996). Audits further revealed that program funds were spent on "spouse meals, open bars, individual bar bills, and golf fees," *id.* at 14, and on a country club membership for the President of Cotton Inc., *id.* at 17.

[15] For precisely these reasons, it is no answer to argue that these programs' infringements on the speech rights of dissenters will be handled by the referendum process. U.S. Br. 32, 36, 42; Neb. Cattlemen Br. 4, 43, 44. As a factual matter, it is clear (for the reasons noted above) that the referendum process simply has not protected minorities. This result is not surprising—as this Court previously has recognized, referenda are not constitutionally sufficient to protect minority speech rights. *Santa Fe*, 530 U.S. at 304 (a "student election system .... implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced"; "this student election ... places the students who hold [minority] views at the mercy of the majority"); *Southworth*, 529 U.S. at 235. These problems are exacerbated by

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The Beef Program, like other agricultural checkoff programs, taxes unwilling participants to fund speech that is in no real sense the government's. Although the government outlines the basic message, the speech is voiced on behalf of the taxed, using the funds that they have been forced to contribute. Under these circumstances, the program cannot be justified as government speech. The speech is compelled, and as such is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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the Beef Board's misappropriation of checkoff funds to campaign against an adverse referendum. *LMA*, 132 F. Supp. 2d at 820-22, 825-26.